UNITED STATES OF AMERICA
UNITED STATES COAST GUARD vs.
MERCHANT MARINER'S DOCUMENT
Issued to: Gary S. LEWIN 003407

DECISION OF THE VICE COMMANDANT ON APPEAL
UNITED STATES COAST GUARD

2468

Gary S. LEWIN

This appeal has been taken in accordance with 46 U.S.C. 7702 and 46 CFR 5.701.

By order dated 30 June 1987, an Administrative Law Judge of the United States Coast Guard at Seattle, Washington, suspended outright Appellant's Merchant Mariner's License with endorsements for a period of two months upon finding proved a Charge of Misconduct, supported by four specifications and a Charge of Negligence, supported by one specification.

The first specification found proved under the Charge of Misconduct alleged that Appellant, while acting under the authority of the captioned license as pilot aboard the T/V CEVRON COLORADO, on or about 14 August 1986, while said vessel was underway on the Columbia River, wrongfully failed to comply with 33 U.S.C. 2006, Inland Navigation Rule 6, by failing to travel at a moderated speed in fog and restricted visibility, contributing to the collision with the barge T/B FOSS 121.

The second specification found proved under the Charge of Misconduct alleged that Appellant, while acting under the authority of the captioned license a pilot aboard the T/V CHEVRON COLORADO, on or about 14 August 1986, while said vessel was underway on the Columbia River, wrongfully failed to comply with 33 U.S.C. 2007, Inland Navigation Rule 7, by failing to properly determine the risk of collision between the T/V CHEVRON COLORADO and the barge T/B FOSS 121, contributing to the collision of these vessels.

The third specification found proved under the Charge of Misconduct alleged that appellant, while acting under the authority of

the captioned license as pilot aboard the T/V CHEVRON COLORADO, on or about 14 August 1986, while said vessel was underway on the Columbia River, wrongfully failed to comply with 33 U.S.C. 2005, Inland Navigation Rule 5, by failing to post a proper lookout, contributing to the collision between the T/V CHEVRON COLORADO and the barge T/B FOSS 121.

The fourth specification found proved under the Charge of Misconduct alleged that appellant, while acting under the authority of the captioned license as pilot aboard the T/V CHEVRON COLORADO, on or about 14 August 1986, wile said vessel was underway on the Columbia River, wrongfully failed to comply with 33 U.S.C. 2008, Inland Navigation Rule 8, by failing to take adequate action to avoid collision between the T/V CHEVRON COLORADO and the barge T/B FOSS 121, contributing to the collision of these vessels.

The single specification found proved under the Charge of Negligence alleged that Appellant, while acting under the authority of the captioned license as pilot aboard the T/V CHEVRON COLORADO, on or about 14 August 1986, while said vessel was underway on the Columbia River in conditions of fog and restricted visibility, failed to navigate said vessel in compliance with the Inland Navigation Rules, contributing to the collision with the barge T/B FOSS 121.

The hearing was held at Portland, Oregon, on 26 February, 6, and 27 April 1987.

Appellant appeared personally at the hearing with professional counsel. Appellant entered, in accordance with 46 CFR 5.527(a), an answer of deny to each charge and specification.

The Investigating Officer introduced in evidence ten exhibits and called one witness.

Appellant introduced ten exhibits into evidence and called one witness. Appellant testified in his own behalf.

The Administrative Law Judge admitted one document as an Administrative Law Judge exhibit.

After the hearing the Administrative Law Judge rendered a decision in which he concluded that each charge and respective specification had been found proved, and entered a written order suspending outright all licenses and/or documents with endorsements issued to Appellant for a period of two months from the date such

licenses and documents are surrendered to the United States Coast Guard.

The complete Decision and Order was dated 30 June 1987 and was served on Appellant on 9 July 1987. Appellant requested and was provided a copy of the transcript of the hearing. Appeal was timely filed and considered perfected on 4 December 1987.

FINDINGS OF FACT

At all times relevant, Appellant was the holder of a Coast Guard Merchant Mariner's License, No. 003407 with pilot's endorsement. Appellant's License with this endorsement authorized him to serve as Master of steam and motor vessels of any gross tons upon the oceans and First Class Pilot of steam and motor vessels of any gross tons on the Columbia River from Tongue Point, Oregon to the sea.

The T/V CHEVRON COLORADO, 16,941 gross tons, Official Number 577358, is a 631 foot steel hull, gas turbine propelled, inspected tank ship (oil carrier). The vessel is propelled by a single variable pitch propeller, a single rudder, and a bow thruser. The pilot house is located at the stern of the vessel about 515 feet from the bow. At the time of the collision, the vessel was equipped with radio for bridge to bridge communications, radar, and a collision avoidance system. At all times relevant herein, the T/V CHEVRON COLORADO was engaged in a coastwise voyage which commenced at Richmond, California and was destined for Willbridge, Oregon. During that part of the voyage upon the Columbia River, the T/V CHEVRON COLORADO was required by 46 U.S.C. 8502, 7101 to be under the direction and control of a federally licensed pilot.

At or about 0600, 14 August 1986, Appellant, acting under the authority of the captioned license, boarded the T/V CHEVRON COLORADO at a point off the mouth of the Columbia River approximately one mile south of the Large Navigational Buoy and took control of the vessel. The master of the T/V CHEVRON COLORADO and Appellant agreed to proceed up the river at a speed setting of 6 megawatts, the vessel's normal sea speed. The vessel's normal sea speed is approximately 13 and a half knots.

The visibility at the Large Navigational Buoy at that time was approximately two miles. The tide was two hours before high tide at Astoria, Oregon with a moderate flood current pushing the vessel. At or about 0615, shortly after passing Buoy 2, the Low Visibility Plan was implemented on board the T/V CHEVRON COLORADO in anticipation of

fog. At or about 0618, the T/V CHEVRON COLORADO began sounding fog signals. At or about 0630, in the vicinity of Buoy 10, the master ordered the lookout to the bow. At the same time, unbeknownst to the Appellant, the Chief Mateordered the lookout to clear the anchors on the bow. The visibility deteriorated to between one tenth and two tenths of a mile between Buoys 10 and 12. The visibility had not changed between Buoys 14 and 20 at the time of the collision between the T/V CHEVRON COLORADO and the barge T/B FOSS 121 at or about 0640.

At the time Appellant assumed control of the T/V CHEVRON COLORADO, the tug MARGARET FOSS was proceeding seaward down the Columbia River with the barge T/B FOSS 121 in tow astern. The first communication between Appellant and the tug MARGARET FOSS occurred at or about 0611 as the T/V CHEVRON COLORADO was in the vicinity of Buoy 2. The operator of the MARGARET FOSS requested passing arrangements. Appellant responded that he would talk to the operator of the MARGARET FOSS a little bit later when the two vessels got a little closer to make the passing arrangements. At the time of this first communication the tug MARGARET FOSS with the barge T/B FOSS 121 in tow was in the vicinity of Buoy 29.

The second communication between Appellant and the operator of the tug MARGARET FOSS occurred shortly before 0620 when the T/V CHEVRON COLORADO was passing between Buoys 4 and 6. Again the operator of the tug MARGARET FOSS requested passing arrangements. The operator of the tug MARGARET FOSS informed Appellant that he had fishing traffic where he was located. Again, Appellant declined to make a passing arrangement until the vessels were closer.

The third communication between Appellant and the operator of the tug MARGARET FOSS occurred shortly after 0630 when the T/V CHEVRON CLORADO was passing between Buoys 10 and 12. Appellant and the operator of the tug MARGARET FOSS agreed to pass each other port to port. Appellant informed the operator of the tug that there was good water well to the north of the channel and requested that the operator swing wide on the turn. The operator of the tug MARGARET FOSS acknowledged the agreement to pass port to port. At this time the tug MARGARET FOSS with the barge T/B FOSS 121 was approximately three miles from the T/V CHEVRON COLORADO at Buoy 21. At the time this agreement was made the Appellant was experiencing one to two miles visibility. No reports concerning visibility ahead of the T/V CHEVRON COLORADO were requested or received by the Appellant. No further radio communications were held between the Appellant and the operator of the tug MARGARET FOSS prior to the collision.

Due to the fog, Buoy 12 was not visible to bridge personnel on the T/V CHEVRON COLORADO as it passed the buoy, however the buoy's sound signal was heard from the approximate position where the buoy should have been located. Appellant began his turn in the vicinity of Buoy 14 with about 15 or 20 degrees right rudder. The vessel continued to maintain a normal sea speed setting of 6 megawatts throughout the turn and up to the time of the collision.

Appellant watched the radar during the turn, watching the buoys and the tug MARGARET FOSS. Prior to completing his turn, Appellant ordered his rudder amidships. Appellant observed that his vessel and the tug MARGARET FOSS were closer than he had anticipated. Appellant did not give a course command at that time.

Appellant first felt he may have had a problem with the radar. Secondly, he felt the current may have set the vessel more than he had anticipated when he made the turn. Thirdly, Appellant felt the operator of the tug MARGARET FOSS may have turned to his left, instead of to his right.

Appellant checked his radar against the ship's heading and determined the problem was not radar error. Appellant then ordered right fifteen degrees rudder. Appellant assumed he was being set too far out into the channel. At this time the tug and tow were on Appellant's port side. Appellant continued to watch the radar and determined that something was wrong and ordered hard right rudder. Appellant felt that according to his radar the tug and tow should have been moving away from him, but they were getting closer.

The personnel on the bridge saw the tug visually just under the break of the forecastle head on the starboard bow. The barge T/B FOSS 121 was off the port bow. Appellant ordered the engines full astern at the time of the collision with the barge T/B FOSS 121. After the collision the tug went down the starboard side of the T/V CHEVRON COLORADO and the barge went down the port side.

Appellant had not kept a radar plot of tug MARGARET FOSS prior to the collision. Appellant did not reduce speed upon entering the fog. The T/V CHEVRON COLORADO was moving at about 9 to 13 knots over the ground at the time of collision. No injuries to personnel resulted from the collision.

BASES OF APPEAL

Appellant raises the following issues on appeal:

1) A Columbia Bar Pilot may not be found in violation of Inland Navigation Rule 5 (33 U.S.C. 2005) for failure to post a look-out where the Pilot confirms that the Master has posted the lookout but, unknown to the Pilot, additional duties were assigned to the look-out by the Mate.

2) The Administrative Law Judge failed to apply the proper standard of proof at the hearing.

3) The Administrative Law Judge's determination that Appellant violated Inland Navigation Rules 6, 7 and 8 is not supported by substantial evidence.

Appearance: Thomas E. McDermott, Esq.

OPINION

I

The first issue on appeal is whether the Appellant, as a pilot, can be held in violation of Inland Navigation Rule 5 for failing to post a look-out where he confirms that the Master has posted a look-out, and unbeknownst to Appellant, the Mate has assigned addtional duties that prevent him from carrying out his duties as look-out.

The evidence in the record clearly shows that the Appellant was aware that the Master had assigned a lookout to the bow, a position some five hundred and fifteen feet from the bridge. (Transcript at 17, 152). It is also clear that Appellant was not aware that the Mate had instructed the lookout to clear the anchors before assuming his look-out duties. (Transcript at 153). At the time of the collision the lookout was still clearing the anchors. (Transcript at 17).

Inland Navigation Rule 5 states that every vessel shall maintain a proper look-out. This duty does not fall squarely on the Pilot, but is shared with the Master. Appellant was aware that the look-out had been assigned. Appellant was not in direct communication with the look-out. Absent evidence that Appellant knew or should have known that the look-out was not performing his duties, Appellant can not be held responsible for failing to maintain a proper look-out. Cf. Appeal Decision 2390 (PURSER), aff'd sub nom Commandant v. Purser, NTSB Order No. EM-130 (1986); Appeal Decision 2229 (KELLEY).

With regard to this specification, the findings of the Administrative Law Judge are reversed and set aside.
NOTE: CITES OK

II

Appellant argues that the Administrative Law Judg applied the wrong standard of proof at the hearing. I disagree.

The proper standard of proof for a hearing convened pursuant to 46 U.S.C. 7703 is set forth at 46 CFR 5.63:

"In proceedings conducted pursuant to this part, findings must be supported by and in accordance with the reliable, probative, and substantial evidence. By this is meant evidence of such probative value as a reasonable, prudent and responsible person is accustomed to rely upon when making decisions in important matters."

Appellant argues that this standard refers to both the quality and quantity of the evidence. When referring to quantity, Appellant argues that the Investigating Officer carries the burden of proving the charges by a preponderance of the evidence. In support of this, Appellant cites the Supreme Court holding in Steadman v. SEC, 450 US 91, 67 L. Ed. 2d 69, 101 S. Ct. 999 (1981), which concluded that the preponderance of evidence standard of proof shall be applied in administrative hearings governed by the Administrative Procedures Act, 5 U.S.C. 556(d).

Appellant has correctly stated the proper standard of proof to be applied in Coast Guard suspension and revocation proceedings. The Investigating Officer must prove the charges and specifications by a preponderance of the evidence. Congress has specifically made the provisions of the Administrative Procedures Act, including 5 U.S.C. 556(d), applicable to suspension and revocation proceedings. See 46 U.S.C. 7702. In reviewing th language in 5 U.S.C. 556(d) and the legislative history of the Administrative Procedures Act, the Supreme Court, in Steadman, supra, found that it was the intent of Congress to establish a preponderance standard in administrative hearings to ensure due process. The regulation in question, 46 CFR 5.63, was revised in 1985 to reflect the holding in Steadman, and tracks the language of 5 U.S.C. 556(d).

Earlier appeal decisions, prior to the Steadman holding, under the predecessor of this regulation, may have held that something less than a preponderance of the evidence was required. In those

decisions, "substantial evidence" was held to mean the kind of evidence a reasonable mind might accept as adequate to support a conclusion. Appeal Decisions 2284 (BRAHN); 1880 (NATIVIDAD). See, also, Appeal Decision 2444 (JAHN), rev'd on other grounds sub nom. Commandant v. Jahn, NTSB Order EM-88 (1981).

However, having correctly stated the proper standard of proof, Appellant goes on to argue that the Administrative Law Judge failed to state this standard and that the Administrative Law Judge must have applied a lesser standard based on Appellant's review of the evidence. Appellant does not support his argument that the Administrative Law Judge applied a lesser standard.

Appellant does not have a right to be advised on the record regarding the standard of proof to be applied. The Administrative Law Judge is required to weigh the evidence presented at the hearing and make appropriate findings in accordance with the regulations, incluing current 46 CFR 5.63. Upon review of the record, I find that there is no evidence in the record that the Administrative Law Judge did not apply the proper standard of proof. I find no merit in Appellant's argument on this issue.

III

Appellant asserts that the Administrative Law Judge's finding that Appellant had violated Inland Navigation Rules 6, 7 and 8 is not supported by substantial evidence. I disagree.

A

Inland Navigation Rule 6

Inland Navigation Rule 6, which governs a vessel's safe speed, states:

"Every vessel shall at all times proceed at a safe speed so that she can take proper and effective action to avoid collision and be stopped within a distance appropriate to the prevailing circumstances and conditions.

In determining a safe speed the following factors shall be among those taken into account:

(a) By all vessels:

(i) the state of visibility;

(ii)the traffic density including concentration of fishing vessels or any other vessels;

(iii)the maneuverability of the vessel with special reference to stopping distance and turning ability in the prevailing conditions;
....
(v) the state of wind, sea, and current, and the proximity of navigational hazards;

(vi)the draft in relation to the available depth of water;

(b) Additionally, by vessels with operational radar:

(ii)any constraints imposed by the radar range scale in use;

(v) the number location, and movement of vessels detected by radar.

The Administrative Law Judge quoted the appropriate sections of Inland Navigation Rule 6 and set forth the facts supporting a finding of a violation of Rule 6 in the Decision & Order at pages 19 and 20. The Administrative Law Judge took into account the forces that may have acted upon the T/V CHEVRON COLORADO to reduce its actual speed over the ground. (Decision & Order at p. 21). See Appeal Decision 2390 (PURSER), aff'd sub nom Commandant v. Purser, NTSB Order No. EM-130 (1986). What constitute a safe speed must be determined on a case by case basis after analyzing the facts based on the factors in the rule. Appeal Decision 2294 (TITTONIS); Appeal Decision 2359 (WAINE).

The record does not support either Appellant's claim in his brief that "when Appellant timely learned that the MARGARET FOSS was 'too close', the T/V CHEVRON COLORADO was only traveling seven knots," or his claim that the T/V CHEVRON COLORADO was only traveling 3 1/2 knots at the time of collision. On the contrary, the record is replete with indications that Appellant did not know exactly how fast the vessel was proceeding, and that he could only make estimates based on assumptions. On direct examination at the hearing, in response to a question concerning the speed of the T/V CHEVRON COLORADO after the turn at Buoy 14, Appellant stated:

"Over the ground, if I was doing ten, she would probably knock down to about seven." (Transcript at p. 185).

Again, on direct examination, in response to a question concerning the speed of the vessel at the time of collision, Appellant stated:

"I can't give an exact estimate, by that time we had slowed right down." (Transcript at p. 212).

The record does show that the only time Appellant actually measured his speed, he determined that the T/V CHEVRON COLORADO was proceeding at "a little less than twelve knots" as the vessel passed Buoy 12. (Transcipt at p. 180). The Chief Mate, who had been on the bridge, testified that he estimated the speed of the T/V CHEVRON COLORADO to be "probably nine or ten knots" at the time of the collision. (Transcript at p. 35).

Conflicting evidence will not be reweighed on appeal, if the findings of the Administrative Law Judge can reasonably be supported. The rule in this regard is well established.

"When ... an Administrative Law Judge must determine what events occurred from the conflicting testimony of several witnesses, that determination will not be disturbed unless it is inherently incredible."

Appeal Decision 2390 (PURSER), aff'd sub nom Commandant v. Purser , NTSB Order No. EM-130 (1986); Appeal Decisions 2356 (FOSTER), 2344 (KOHAJDA), 2340 (JAFFE), 2333 (AYALA), and 2302 (FRAPPIER).

"It is well established that the opportunity of the Administrative Law Judge to observe the demeanor of the witnesses affords him a significant advantage when it becomes necessary to choose between conflicting versions of an event."

Appeal Decision 2353 (EDGELL). See also Appeal Decision 2159 (MILICI).

Application of the half-distance rule as set forth by the Supreme Court in Union Oil v. The San Jacinto, 409 US 140, 93 S.C. 368, 34 L.Ed.2d 365 (1972) is proper in suspension and revocation proceedings involving the issue of safe speed in fog or reduced visibility. Appeal Decision 2004 (LORD); Appeal Decision 2027 (WALKER), aff'd sub nom Commandant v. Walker, NTSB Order No. EM-52 (1976).

Appellant asserts on appeal that due to external factors

operating on the vessel in the Columbia river the T/V CHEVRON COLORADO was proceeding at the slowest speed available to maintain steerageway. There is no reliable evidence in the record to prove what this minimum speed is for the T/V CHEVRON COLORADO. (Transcript at p. 39). At best the record reflects that some speed is necessary especially with a flood tide. (Transcript at p. 39). However, there is no clear evidence that with the factors present on the day of the collision, the speed setting of 6 megawatts on the T/V CHEVRON COLORADO was necessary to barely maintain steerageway. In similar cases, the majority rule appears to be that "inability to keep steerageway is not an excuse for exceeding moderate speed." Commandant v. Walker, NTSB Order No. EM-52 (1976); Anglo-Saxon Petroleum Co. v. United States, 224 F.2d 86 (2d Cir. 1955); Barrios Bros. Inc. v. Lake Tankers Corp., 188 F. Supp. 300 (EDLA 1960), aff'd per curiam286 F.2d 573 (5th Cir. 1961).

The Administrative Law Judge found that the "vessel had never reduced its speed and was traveling too fast to stop (and thus avoid the collision) within the time span allowed by the fog and reduced visibility. It was clearly in violation of Rule 6." (Decision & Order at p. 21). This finding is suppoted by substantial evidence in the record and set forth in the Administrative Law Judge's Decision and Order and will not be disturbed on appeal.

B

Inland Navigation Rule 7

Appellant also argues that the Administrative Law Judge's determination that Appellant violated Inland Navigation Rule 7 is not supported by substantial evidence. The specification found proved by the Administrative Law Judge stated that Appellant wrongfully failed to determine properly what risk of collision existed in the meeting of the T/V CHEVRON COLORADO and the barge T/B FOSS 121, contributing to the collision of the vessels.

Inland Navigation Rule 7 states:

(a) Every vessel shall use all available means appropriate to the prevailing circumstances and conditions to determine if risk of collision exists. If there is any doubt such risk shall be deemed to exist.

(b) Proper use shall be made of radar equipment if fitted and

operational, including long-range scanning to obtain early warning of risk of collision and radar plotting or equivalent systematic observation of detected objects.

(c) Assumptions shall not be made on the basis on scanty information, especially scanty radar information.

(d) In determining if risk of collision exists the following considerations shall be taken into account:

(i) such risk shall be deemed to exist if the compass bearing of an approaching vessel does not appreciably change; and

(ii) such risk may sometimes exist even when an appreciable bearing change is evident, particularly when approaching a very large vessel or a tow or when approaching a vessel at close range.

The Administrative Law Judge found that Appellant failed to contact the operator of the tug MARGARET FOSS upon entering an area of fog and reduced visibility. Furthermore, Appellant failed to contact the operator of the tug MARGARET FOSS prior to the collision. (Decision & Order at p. 13.) Appellant's last communication with the operator of the tug MARGARET FOSS took place in the vicinity of Buoy 10. At that time a port to port passing arrangement was made with visibility at Buoy 10 reported clear (one to two miles). (Transcript at p. 16). The visibility deteriorated to one tenth to two tenths of a mile at Buoy 12. (Transcript at p. 17, 39).

The T/V CHEVRON COLORADO was equipped with two radar repeaters and a collision avoidance system on the bridge. (Transcript at pp. 15-16). Although Appellant was using the radar, he was not pltting the position of the tug MARGARET FOSS. (Transcript at p. 189-191). Appellant knew that the radar picture indicating the relative position of the tug MARGARET FOSS and her tow would be disrupted by the turn of the T/V CHEVRON COLORADO. (Transcript at p. 190)

Appellant testified that as he began to make his turn at Buoy 14 he observed on radar some fishing vessels in the vicinity of Buoy 14. Appellant further testified that on the radar, "it's a little hard to distinguish the fishing vessel from the buoy." (Transcript at p. 197). The master of the T/V CHEVRON COLORADO commenced his turn without direction from Appellant. Appellant assumed the T/V CHEVRON COLORADO was in the proper location to make the turn based solely on his perception of the position of Buoy 14 from listening for the buoy's sound signal. (Transcript at p. 198). Appellant did not countermand

the turn order. Appellant failed to use radar ranges to determine his position during the turn, moments before the collision. (Transcript at p. 227).

Prior to the turn at Buoy 14, Appellant noted the position of the tug MARGARET FOSS and her tow on the radar. However, Appellant testified that he did not use the variable range marker of the radar to determine the distances to the tug and tow prior to the collision. (Transcript at p. 226). Appellant stated that he was more interested in watching him on the scope. (Transcript at p. 226). Appellant testified that the tug and tow's position "looked good" only minutes before the collision. (Transcript at p. 197). During the turn, Appellant testified, "...I was watching the radar, and it didn't look like it was supposed to look by thetime I was done with this turn... The tug and I were closer than I anticipated." (Transcript at p. 199). Again, Appellant testified that the radar information was affected by the turning of the T/V CHEVRON COLORADO. (Transcript at p. 200).

Appellant testified that "something is not right." (Transcript at p. 201). Appellant further testified that he felt the problem could be one of three alternatives. First, an error in the radar may have existed. Second, Appellant had misjudged the current. Lastly, the tug MARGARET FOSS and the barge T/B FOSS 121 had come left of course. (Transcript at p. 202). Appellant chose to rule out the radar malfunction before taking any other action. (Transcript at pp. 202, 203). Appellant then assumed that the T/V CHEVRON COLORADO was too far out in the channel and began making course corrections. (Transcript at p. 204). At this time the tug and tow were still where they were supposed to be according to the radar. (Transcript at p. 205).

After making further course corrections, Appellant determined that the tug MARGARET FOSS and the tow were coming at the T/V CHEVRON COLORADO. (Transcript at p. 207). At no time after the passing arrangement had been made did Appellant attempt to contact the operator of the tug MARGARET FOSS on the radio-telephone. (Transcript at p. 217).

As has been set forth, conflicting evidence will not be reweighed on appeal, if the findings of the Administrative Law Judge, who observed the witness's demeanor, can reasonably be supported. Appeal Deciion 2390 (PURSER), aff'd sub nom Commandant v. Purser, NTSB Order No. EM-130 (1986); Appeal Decisions 2356 (FOSTER), 2344 (KOHAJDA), 2340 (JAFFE), 2333 (AYALA), and 2302 (FRAPPIER). Appeal Decision 2353 (EDGELL). See also Appeal Decision 2159 (MILICI).

Applying the substantial evidence test in 46 CFR 5.63, the record clearly reflects that the findings, with respect to the violation of Inland Navigation Rule 7, are amply supported by reliable, probative, and substantial evidence. As shown, Appellant failed to properly utilize the radar aboard the T/V CHEVRON COLORADO to generate important information relating to the position of not only the T/V CHEVRON COLORADO, but also the tug MARGARET FOSS and the barge T/B FOSS 121. Appellant failed to maintain a radar plot or have one maintained by other personnel. The most serious failure was Appellant's election not to communicate with the operator of the tug MARGARET FOSS to discuss the reduced visibility, location of other vessels, and risk of collision. Appeal Decision 2359 (WAINE). The findings of the Administrative Law Judge with respect to Inland Navigation Rule 7 are supported by substantial evidence and will not be disturbed on appeal.

C

Inland Navigation Rule 8

Appellant also argues that the Administrative Law Judge's determination that Appellant violated Inland Navigation Rule 8 is not supported by substantial evidence. The specification found proved by the Administrative Law Judge stated that Appellant wrongfully failed to take adequate action to avoid a collision with the barge T/B FOSS 121, contributing to the collision between the vessels.

The pertinent provisions of Inland Navigation Rule 8 are:

(a) Any action taken to avoid collision shall, if the circumstances of the case admit, be positive, made in ample time and with due regard to the observance of good seamanship.

(b) Any alteration of course and/or speed to avoid collision shall, if the circumstances of the case admit, be large enough to be readily apparent to another vessel observing visually or by radar; a succession of small alterations of course and/or speed should be avoided.

(c) If there is sufficient sea room, alteration of course alone may be the most effective action to avoid a close-quarters situation

provided that it is made in good time, is substantial and does not result in another close quarters situation.

(d) Action taken to avoid collision with another vessel shall be such as to result in passing at a safe distance. The effectiveness of the action shall be carefully checked until the other vessel is finally past and clear.

(e) If necessary to avoid collision or allow more time to assess the situation, a vessel shall slacken her speed or take all way off by stopping or reversing her means of propulsion.

The Administrative Law Judge found that Appellant's actions were not taken in ample time as required by the rule. (Decision & Order at p. 28). Appellant refused to discuss a passing arrangement with the operator of the tug MARGARET FOSS until approximately ten minutes before the collision, at which time the T/V CHEVRON COLORADO had already crossed the Columbia river bar. (Transcript at p. 14). No arrangements were made to meet before or after the turn in the vicinity of Buoy 14. (Transcript at pp. 223, 225). Appellant continued to approach the tug and tow, in the fog, without accurate assessment of the closing distance between the vessels. (Transcript at pp. 226). The Administrative Law Judge found that over reliance on the passing arrangement, a lack of frequent, diligent and timely use of the radar and radio telephone resulted in violation of Inland Navigation Rule 8. (Decision & Order at p. 28).

The record reflects that prior to the collision the passage of the T/V CHEVRON COLORADO was normal, including the maintenance of a six megawatt speed setting, the equivalent of normal sea speed. (Transcript at pp. 11, 41). Regardless of the changes in visibility, the speed setting was not changed until the vessels were about to collide. (Transcript at p. 18). The Chief Mate of the T/V CHEVRON COLORADO testfied that Appellant never decreased speed prior to the collision. The Chief Mate stated, "By the time he [master] put the engines astern we had hit the barge." (Transcript at p. 26). Appellant testified that he had no experience stopping the 600 ft. T/V CHEVRON COLORADO. (Transcript at p. 236).

A reduction in speed would have given Appellant more time in which to avoid the collision by means of his radar and radio telephone. Appeal Decision 2359 (WAINE). This is compounded by Appellant's admission that he suffered a moment of panic when he realized collision was imminent. (Transcript at p. 209). The

Administrative Law Judge found that Appellant's actions were not made in ample time, that Appellant failed to carefully check his actions and the progress of the tug MARGARET FOSS until it was past and clear, and that Appellant failed to slacken speed in order to avoid the collision or to allow more time to assess the situation. (Decision & Order at p. 28).

Appellant argues on appeal that he had to maintain the six megawatt speed setting in order to maneuver the vessel. Appellant did not know how fast the T/V CHEVRON COLORADO was moving at the time of the collision. (Transcript at pp 212, 213). The Chief Mate testified that the T/V CHEVRON COLORADO required some speed to maintain steerageway. (Transcript at p. 39). However, there was no evidence produced to prove that the six megawatt setting was the minimum speed necessary to maintain steerageway.

Appellant further argues on appeal that the entire incident occurred in only a matter of seconds, and therefore he did not have time to call the operator of the tug MARGARET FOSS, only time to take evasive maneuvers. (Appellant's Brief at pp. 23-26). Appellant's argument is neither persuasive, nor is it supported by the record. Appellant was located three miles from the tug MARGARET FOSS at the time the passing arrangement was made. (Transcript at p. 224). This occurred approximately ten minutes prior to the collision. (I.O. Exhibit 6). Appellant knew or should have known that he would meet the tug and tow in the fog at a turn in the Columbia River. Appellant had ample time to arrange to meet the tug MARGARET FOSS either before or after the turn at Buoy 14. Appellant testified that he only elected to take evasive action after he ruled out radar error. The Administrative Law Judge found that Appellant violated Inland Navigation Rule 8 in failing to take action in ample time and carefully check his actions. (Decision & Order at p. 28). The findings of the Administrative Law Judge with respect to Inland Navigation Rule 8 are supported by substantial evidence as shown and will not be disturbed on appeal.

IV

Since the findings and decision of the Administrative Law Judge with respect to the third specification under the misconduct charge have been reversed the order of the Administrative Law Judge must be reassessed.

The rule that has been consistentlyapplied in review of

suspension and revocation proceedings has been that:

"The order in a particular case is peculiarly within the discretion of the Administrative Law Judge and, absent some special circumstances, will not be disturbed on appeal." Appeal Decision 2379 (DRUM); Appeal Decision 2366 (MONAGHAN); Appeal Decision 2352 (IAUKEA); Appeal Decision 2344 (KOHAJDA); Appeal Decision 1751 (CASTRONUOVO).

The Administrative Law Judge carefully weighed all the factors, including Appellant's prior record, in determining a proper order. (Decision & Order at p. 30). The Administrative Law Judge correctly noted that the misconduct and negligence charges were duplicitous and a finding of proved in each charge would not support an increased sanction since both charges arose from the same factual occurrences. (Decision & Order at pp. 17, 18). The Administrative Law Judge also considered the Table of Average Orders (46 CFR 5.569), noting that it was not binding, but available for guidance. (Decision & Order at p. 31).

The Administrative Law Judge found the multiple violation of the navigation rules to be significant. Furthermore, he found that a short period of outright suspension was appropriate and would accomplish the remedial purposes of the proceeding. (Decision & Order at p. 31).

Despite the reversal of the finding of proved with respect to the third specification of the misconduct charge, the charge of misconduct is still suppored by findings of proved with respect to violations of Inland Navigation Rules 6, 7, and 8. These violations were serious, resulting in a collision with a great degree of potential for serious harm to property, life, and the environment.

Both the misconduct charge and the negligence charge would independently support a two month outright suspension upon examination of the Table of Average Orders. Upon review of the record, I find no special circumstances that would justify a modification of the Administrative Law Judge's order on appeal. Due to the serious nature of the charges and specifications and the remedial purpose of these proceedings, I find that the order is not clearly excessive.

CONCLUSION

Having reviewed the entire record and considered Appellant's arguments, I find that the finding of the Administrative Law Judge as

to the third specification of the misconduct charge is not supported by substantial evidence of a reliable and probative character. The findings of the Administrative Law Judge as to the remaining specifications of the misconduct charge and the single specification of the negligence charge are supported by substantial evidence of a reliable and probative character. The order of the Administrative Law Judge is appropriate for the violations found proved in the charges and remaining specifications. The hearing was conducted in accordance with the requirements of applicable regulations.

ORDER

The decision and order of the Administrative Law Judge dated 30 June l987 at Seattle, Washington, is MODIFIED as follows:

With respect to the third specification of the misconduct charge involving alleged violation of Inland Navigation Rule 5, the decision of the Administrative Law Judge is VACATED, the findings are SET ASIDE, and that specification is DISMISSED.

With respect to the remaining specifications and charges, the decision of the Administrative Law Judge is AFFIRMED.

The order is AFFIRMED.

CLYDE T. LUSK, JR.
Vice Admiral, U.S. Coast Guard
Vice Commandant

Signed at Washington, D.C. this 12th day of July, l988.

3. HEARING PROCEDURE

.96 Standard of Proof

supported by reliable, probative, and substantial evidence

4. PROOF AND DEFENSES

.99 Proof

by substantial evidence

5. EVIDENCE

.36.1 Findings

supported by reliable, probative, and substantial evidence

.100 Substantial

requirement of

6. MISCONDUCT

.362 Violation, Rules of the Road

failure to reduce speed

failure to assess risk of collision

failure to avoid collision

7. NEGLIGENCE

.50 Lookout

failure to maintain, in reduced visibility

knew or should have known of additional duties

.60 Moderate speed in fog

collision

.70 Negligence

excessive speed in fog

failure to avoid collision

11. NAVIGATION

.16 Collision

action to avoid collisions

fog, ability to stop

radio, use in fog

.31 Fog

radar, use of
radio, use of

speed, failure to reduce

.65 Navigation, Rules of

departure from rules

reduced speed in fog

.81 Risk of Collision

appropriateness of actions

use of radio to assess

.88 Speed

failure to reduce in fog

12. ADMINISTRATIVE LAW JUDGES

.50 Findings

supported by reliable, probative, and substantial evidence

13. APPEAL AND REVIEW

.04 Administrative Law Judge

order not modified unless obviously excessive

.60 Modification of ALJ's Order

order not modified unless obviously excessive

order not modified absent special circumstances

CITATIONS

Appeal Decisions Cited: 1751 (CASTRONUOVO), 1880 (NATIVIDAD), 2004 (LORD), 2027 (WALKER), 2159 (MILICI), 2229 (KELLEY), 2284 (BRAHN), 2294 (TITTONIS), 2302 (FRAPPIER), 2333 (AYALA), 2340 (JAFFE), 2344 (KOHAJDA), 2352 (IAUKEA), 2352 (EDGELL), 2356 (FOSTER), 2359 (WAINE), 2366 (MONAGHAN), 2376 (FRANK), 2379 (DRUM), 2390 (PURSER), 2395 (LAMBERT), 2444 (JAHN).

NTSB Cases Cited: Commandant v. Purser, NTSB Order No. EM-130 (1986); Commandant v. Jahn, NTSB Order EM-88 (1981); Commandant v. Walker, NTSB Order No. EM-52 (1976).

Federal Cases Cited: Steadman v. SEC, 450 US 91, 67 L. Ed. 2d 69, 101 S. Ct. 999 (1981); Union Oil v. The San Jacinto, 409 US 140, 93 S.Ct. 368, 34 L.Ed.2d 365 (1972); Anglo-Saxon Petroleum Co. v. United States, 224 F.2d 86 (2d Cir. 1955); Barris Bros. Inc. v. Lake Tankers Corp., 188 F. Supp. 300 (EDLA 1960), aff'd per curiam 286 F.2d 573 (5th Cir. 1961).

Statutes Cited: 5 U.S.C. 556, 33 U.S.C. 2006, 33 U.S.C. 2005, 33 U.S.C. 2007, 33 U.S.C. 2008, 46 U.S.C. 7101, 7702, 7703, 8502

Regulations Cited: 46 CFR 5.63, 46 CFR 5.569.

Vice-Commandant

Chief Counsel

Gary S. LEWIN, Appeal from Suspension of Merchant Mariner's License

1. Appellant's license was suspended outright for two months upon findings of proved on two charges involving misconduct and negligence. The misconduct charge was supported by four specifications. The four specifications alleged that Appellant, while acting under the authority of the captioned license as pilot aboard the T/V CHEVRON COLORADO, on or about 14 August 1986, while said vessel was underway on the Columbia River, failed to reduce speed in reduced visibility, failed to properly determine the risk of collision, failed to post a proper lookout, and failed to take adequate action to avoid collision

all of which contributed to the collision between the T/V CHEVRON COLORADO and the T/B FOSS 121. The negligence charge was supported by a single specification. The specification alleged that Appellant failed to navigate the CHEVON COLORADO in compliance with the Inland Navigation Rules, contributing to the collision.

2. Appellant, on appeal, argues that he posted a look-out, but unknown to Appellant, additional duties were assigned to the look-out by the Mate. This argument is persuasive. This specification should be reversed.

3. However, the remaining arguments concerning the proper standard of proof and its application are without merit. There are no issues concerning jurisdiction or clear errors upon review of the record.

4. Despite the reversal of the specification regarding the posting of a lookout, the remaining specifications are serious enough to leave the ALJ's order undisturbed.

5. A draft is prepared to AFFIRM the order of the Administrative Law Judge.

(G-LMI)
202-267-1527

16722/LEWIN

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***** END OF DECISION NO. 2468 *****